No. 20,087

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, etc., et al.,
Appellants,

vs.

RAPHAEL WEILL & COMPANY, INC., d/b/a THE WHITE HOUSE, etc., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLANTS

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BERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

II.

Table of Authorities Cited

Cases

Statutes

Texts

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JURISDICTION

Appellants commenced this action in the Superior Court of the State of California, in and for the City and County of San Francisco, and appellees obtained removal therefrom to the United States District Court for the Northern District of California, Southern Division, on the stated ground that the District Court had original jurisdiction under § 301 of the Labor Management Relations Act. (29 U.S.C. § 185.) The

District Court denied appellants' motion for remand to the state Court and then refused to direct arbitration of certain controversies between appellants and appellees pursuant to the terms of a collective bargaining agreement and refused to grant an injunction restraining and enjoining appellee from transferring, dissipating or otherwise disposing of certain funds which are the subject matter of the dispute sought to be arbitrated. Appellants, on April 21, 1965, filed in this Court a timely notice of appeal under 28 U.S.C. § 1291. This Court's jurisdiction accordingly rests upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

As the record herein shows (affidavit of Robert P. Cowell filed in support of Petition for Arbitration in California Superior Court Action No. 551474, R. 23-25), appellants learned for the first time on January 20, 1965, that respondent Raphael Weill & Company, d/b/a The White House (herein called the White House), had failed to provide a fund for the payment of pensions as required by the collective bargaining agreement between said respondent and the two labor organizations on behalf of which appellants bring this appeal.[1]

Although appellants were never specifically so advised by the White House the indications were that

[1]Said agreement and supplements thereto are part of the record herein as Exhibits A, B, and C to the aforesaid petition filed in the California Superior Court.

said respondent at this time had plans under way for the imminent closing of its business operations and the termination of its employees represented by the said Unions. Accordingly, the representatives of said Unions then and there demanded compliance with the funding requirements of the collective bargaining agreement as to pensions and observance of the agreement in certain other respects or, failing such compliance, arbitration under the agreement of said disputes. (Cowell affidavit, p. 2, R. 24.) Respondent White House failed either to comply as demanded or to proceed to arbitration.

Fearing dissipation of the White House assets before such compliance could be had, appellants made a hurried estimate of the amounts due to the pension fund (see affidavit of Walter Johnson, submitted to the District Court below, R. 90-94), and on January 27, 1965 filed their petition in said Superior Court for an Order Directing that Arbitration Proceed and Complaint for Injunctive Relief Pending Arbitration Award. The appellants instituted the action under the express provisions of state law, to wit, Section 1280, et seq., of the Code of Civil Procedure of the State of California. (See Memorandum of Points and Authorities, accompanying petition, R. 16-18.) On the same day, Presiding Judge Raymond Arata of the Superior Court issued a temporary restraining order enjoining and restraining appellees from disposing of, dissipating or otherwise transferring the assets of appellees to the extent of the approximate sum of $158,000.00, except for payment of wages, pending the

decision of the Court as to whether or not appellants were entitled to an arbitration award with respect to certain specified controversies, including the issue of funded pensions, arising from the terms of the collective bargaining agreement between appellants and appellees (R. 19-20).

Six days later, on February 3, 1965, the White House filed a voluntary petition in bankruptcy, No. 82953, in the United States District Court for the Northern District of California, Southern Division. On February 9, 1965, a hearing in the Superior Court was held on appellants' petition in the state Court action, and on the Order to Show Cause therein. The hearing was continued by the Court until February 11, 1965, with the attorney for the receiver of said appellee present. The Superior Court on February 11, 1965, granted the relief sought by appellants and directed arbitration of the controversies between the parties. The Court also on said date entered a preliminary injunction requiring the deposit in Court of the said $158,000.00 pending the arbitration award or further order of the Court. (R. 49-51.) Said Order and Injunction was duly served on all parties.

Later on the same day, February 11, 1965, attorneys for appellees filed in the United States District Court for the Northern District of California, Southern Division, a petition for removal to that Court of the state Court action (R. 1-3). The ground asserted in support of the removal petition was that the state Court action is one in which the District Courts of the United States are given original jurisdiction by Sec-

tion 301(a) of the Labor Management Relations Act of 1947, as amended. (29 U.S.C. § 185(a).) (See Petition for Removal, p 3, R. 3.)

On February 15, 1965, the District Court issued an ex parte order requiring that the "Order Directing Arbitration to Proceed and for Preliminary Injunction" issued by the Superior Court of the State of California be stayed pending determination of appellees' motion to dissolve said order and to stay further proceedings (R. 55-56).

Appellants, on February 17, 1965, filed in the District Court a motion to remand pursuant to the provisions of 28 U.S.C. § 1447(c), and points and authorities in support thereof (R. 60-65, 81-84). In support of their motion to remand appellants set forth the well-established legal grounds that the party who brings suit is master to decide what law he will rely upon and that Section 301 of the Labor Management Relations Act, as amended (29 U.S.C., § 185) did not deprive state Courts of their traditional exercise of jurisdiction over suits for violation of collective bargaining agreements, citing *inter alia, Dowd Box v. Courtney,* 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483.

Appellants' motion for remand was heard by the District Court on March 3, 1965, and denied on that day.

Thereafter appellants filed a memorandum of points and authorities in opposition to appellees' motion to dissolve the orders of the California Superior Court

(R. 71-79) and submitted an affidavit from Walter Johnson incorporating evidence not theretofore available to appellants (R. 90-94). This evidence consisted, in part, of (1) a trust agreement entered into in 1960 between the respondent White House and Bank of America National Trust and Savings Association purporting to establish a fund for the payment of the pension benefits to the employees represented by the said labor organization under their collective bargaining agreement with the White House (Exhibit A to Johnson affidavit); (2) the fact that only some $1100.00 had been contributed to said fund by the White House since the establishment of said fund; (3) the admission of the president of respondent White House, Ben R. Gordon, by a financial statement prepared in 1963 that at that time the White House had a contingent liability of approximately $300,000.00 in the form of *unfunded* pensions due these same employees (Exhibit B to Johnson affidavit); (4) that since the closing of the business of the White House upon its voluntary bankruptcy on February 3, 1965, there were some 53 former employees of the White House represented by the said Unions who had retired under said pension agreement, but who were no longer receiving pensions from the White House, although entitled thereto by the terms of said collective bargaining agreement, and that there were some 25 additional employees of the White House whose service entitled them to *funded* pensions under said collective bargaining agreement, but that said employees had received no such pension benefits

(R. 90-113). Appellees offered no denial or refutation of this evidence.

Thereafter, on March 16, 1965, a hearing in the District Court on appellees' motion to dissolve the orders of the Superior Court was held, the trustees in bankruptcy of the White House having been authorized by stipulation to intervene as parties. On said day appellees' motion was granted by the District Court and its order issued on March 23, 1965, dissolving all said state Court orders.

This appeal followed.

QUESTIONS INVOLVED

1. Whether pursuant to the Labor Management Relations Act (29 U.S.C. § 141, et seq.) and the national labor policy thereunder, a labor organization representing employees in an industry affecting commerce is entitled to an order either from a state or a federal Court of proper jurisdiction enforcing a collective bargaining contract providing for arbitration of disputes arising thereunder notwithstanding the institution of bankruptcy proceedings by the employer, party to said contract.

2. Whether a suit instituted in state Court under state law to enforce an arbitration provision of a collective bargaining contract in an industry affecting commerce may be removed to a federal District Court and retained therein on the ground that the District Court has original jurisdiction of said action.

SPECIFICATION OF ERRORS

1. The District Court erred when it refused to grant appellants' motion to remand the proceedings to the Superior Court in and for the City and County of San Francisco, State of California.

2. The District Court erred when it refused to sustain the order directing that arbitration proceed issued by the Superior Court in and for the City and County of San Francisco, State of California.

3. The District Court erred when it refused to grant appellants' petition for an order directing that arbitration proceed.

4. The District Court erred when it refused to sustain the issuance of a preliminary injunction by the Superior Court in and for the City and County of San Francisco, State of California.

5. The District Court erred when it refused to grant appellants' petition for a preliminary injunction.

SUMMARY OF ARGUMENT

The Labor Management Relations Act (LMRA) and the interpretation thereof by the Courts and the National Labor Relations Board make it abundantly clear that bankruptcy proceedings were intended to be subordinate and subject to the national labor policy. The LMRA, which specifically refers to and includes trustees in bankruptcy and receivers as persons subject to coverage of the law, recognizes and affirms the

right of parties to collective bargaining agreements to bring suits in state or federal Courts to enforce those agreements. The Courts have consistently held that suits to compel arbitration pursuant to the terms of collective bargaining agreements are included among the types of suits which may be brought in either state or federal Courts.

The arbitration process is accorded a preferred status by both the Courts and the National Labor Relations Board (NLRB) in the resolution of disputes under collective bargaining agreements, with the Courts and the NLRB deferring to the utilization of arbitration in the resolution of such disputes. Recognizing that controversies involving employee rights under collective bargaining agreements may, in fact, survive the cessation of employer operations, arbitration is frequently ordered by the Courts as the proper method of settling contract disputes arising out of the termination of employer operations.

It is clear that the intervention of bankruptcy proceedings may not be used to thwart this affirmative policy favoring arbitration. In view of the express applicability of the LMRA to proceedngs in bankruptcy, actions under that Act to compel arbitration should prevail as against considerations of jurisdiction of the bankruptcy Court in situations involving the resolution of controversies arising under the terms of collective bargaining agreements. That this is the Congressional intent is amply demonstrated by the express language of the LMRA and its interpretation by the Courts and the NLRB.

It is equally clear that the arbitration process is in no way in conflict with orderly administration of the Bankruptcy Act as demonstrated by the decisions of the Courts thereunder.

In accordance with the clear requirements of federal law and policy, the Courts often exercise their traditional and inherent equity power by the use of injunctions whenever the policy favoring arbitration and its use may be threatened by the acts of one party to the collective bargaining agreement. Equity powers are frequently utilized by the Courts to give meaning and effect to their orders relating to the arbitration of controversies.

In accordance with the national labor policy regarding the preferred status to be accorded to the arbitration process and the right of a party to a collective bargaining agreement to enforce agreements relating to the use of arbitration, it is clear that parties to such agreements may bring suit thereon to compel arbitration in either the state or federal Courts. It is well settled law that the plaintiff in such an action may choose the forum for his action and the procedural law upon which he intends to rely. If his choice is to bring an action in a state Court under the procedure provided by state law he may do so and may not be denied this right because the LMRA gives him an additional available forum in the federal Court.

An action to enforce the provisions of a collective bargaining agreement brought in a state Court under state law is not one arising under the LMRA or any

other federal law within the meaning of the Removal Statute (28 U.S.C. § 1441) although the substantive principles of federal labor law and policy are to be applied. Therefore, removal of such a case to a federal District Court is improper.

ARGUMENT

I.

BOTH THE STATE AND FEDERAL COURTS ARE AUTHORIZED BY THE LABOR MANAGEMENT RELATIONS ACT AND THE NATIONAL LABOR POLICY FASHIONED THEREUNDER TO COMPEL AN EMPLOYER TO SUBMIT TO ARBITRATION PURSUANT TO THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT ENTERED INTO BY THAT EMPLOYER AND A LABOR ORGANIZATION, NOTWITHSTANDING THE ADVENT OF BANKRUPTCY PROCEEDINGS INVOLVING THE EMPLOYER.

A. The right of a labor organization to compel an employer, with whom it has entered into a collective bargaining agreement, to submit to arbitration thereunder takes precedence over intervening procedures under the Bankruptcy Act.

The Labor Management Relations Act (LMRA) and the interpretation thereof by the Courts and the National Labor Relations Board (NLRB) make it clear that bankruptcy proceedings were intended to be subordinate and subject to the national labor policy. The Act specifically refers to and includes trustees in bankruptcy and receivers as persons subject to coverage of the law. LMRA § 2(1) (29 U.S.C. § 152(1)); *NLRB v. Coal Creek Coal Co.* (C.A. 10, 1953), 204 F. 2d 579; *NLRB v. Baldwin Locomotive*

Works (C.A. 3, 1942), 128 F. 2d 39; *In re American Buslines* (D.C. Neb. 1957), 151 F. Supp. 877.[2]

In *Baldwin Locomotive Works,* supra, the Court expressly determined that the jurisdiction of a United States District Court in bankruptcy "does not embrace the power" to deal with a debtor's unfair labor practices which affect commerce. (128 F. 2d at 44.) The Court held that under the LMRA the NLRB is granted the power to deal with certain specific problems arising under that Act, and the bankruptcy Court may not interfere with that power. Similarly, in *In re American Buslines,* supra, the federal District Court held that it did not possess the power, as a bankruptcy Court, to command or require a stay of proceedings under the LMRA. The proceedings involved therein were before the NLRB to determine the bargaining representative for employees of a corporation being reorganized. The Court stated:

> "The legislative purpose to include within the employers affected by the Act judicially designated trustees or receivers, *and even by express mention, trustees in bankruptcy,* is thereby made unmistakably clear. *The existence or intervention of bankruptcy,* or corporate reorganization *of an employer is not allowed to deprive his or its employees of the rights defined and assured to them*

[2]Cf. *Cullen v. Bowles* (C.A. 2, 1945), 148 F. 2d 621, where the Court stated:

> "It has been generally held that federal statutes regulating business in the public interest, are equally applicable when the business is run by trustees or receivers." (Id. at p. 623.)

by the Act or to impair, or, as the court is persuaded, to alter the manner of or the forum for the assertion and vindication of those rights." (151 F. Supp. 886; emphasis supplied.)

That the forum for the assertion and vindication of those other rights granted by the Act, as to which the NLRB is not given specific authority, to wit, suits for violations of collective bargaining agreements (LMRA § 301(a); 29 U.S.C. § 185(a)), includes the state and federal Courts is made unmistakably clear by *Dowd Box v. Courtney,* 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483.

In bankruptcy proceedings under Chapter X of the Bankruptcy Act (11 U.S.C. §§ 501-676), there can be no doubt that the provisions of the LMRA and other federal laws defining the rights of employees clearly prevail. Section 15 of the LMRA (29 U.S.C. § 165) explicitly provides that the LMRA will prevail over the provisions in Chapter X of the Bankruptcy Act.[3]

Even though the bankruptcy Court, in reorganization cases, is given express power to issue stays and injunctions (11 U.S.C. § 513), it has been held that a federal law relating to labor, to wit, the Norris-La

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[3]In 6 *Collier on Bankruptcy,* § 15.14(1) it is stated:
"In addition, it is now clear that corporate reorganization will not prevent the invocation of proceedings before the National Labor Relations Board *or other administrative or judicial proceedings under the Act* to carry out and enforce its terms . . . Section 2(1) of the Labor Management Relations Act *further insures that trustees and receivers are covered by the provisions of the Act.*" (Id. at 5225; emphasis supplied.)

Guardia Act (29 U.S.C. §§ 101-115), takes precedence over bankruptcy proceedings. *Anderson v. Bigelow* (C.A. 9, 1942), 130 F. 2d 460; cert. denied, 317 U.S. 690, 63 S. Ct. 265, 87 L. Ed. 552. See also 6 *Collier on Bankruptcy,* § 3.09, Note 17.

It is also to be noted that under Section 272 of Chapter X of the Bankruptcy Act (11 U.S.C. § 672) employees are guaranteed the untrammelled right to join a labor union of their choice. See Teton, *Reorganization Revised* (1939), 48 Yale L.J. 573, 596. It is likewise clear that a trustee or debtor in possession has the power and right to enter into a collective bargaining agreement with the debtor's employees. *Matter of Wil-Low Cafeterias, Inc.* (C.A. 2, 1940), 111 F. 2d 429.[4] Court supervision of corporate reorganization affords the operating possessor "no freedom from its statutory duties to its employees." *NLRB v. Baldwin Locomotive Works,* supra, at page 43. And a trustee or debtor in possession is not immune from statutory liability to employees under the Fair Labor Standards Act. (29

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[4]The Court said:

> "In these days of collective bargaining between labor unions and corporations it would seem strange that the contract which had been arrived at by negotiation usual in form and substance and relating to ordinary wage arrangements should be held unauthorized . . ." (111 F. 2d at 431-432.)

See also, with respect to the survival and effect of employee pension rights in reorganization proceedings, the decision in *Vallejo v. American R. Co. of Porto Rico* (C.A. 1, 1951), 188 F. 2d 513, *remanded In re American R. Co. of Porto Rico* (D.C. Puerto Rico, 1952), 110 F. Supp. 45, *aff'd* 202 F. 2d 149 (C.A. 1, 1952).

U.S.C. 201, et seq.) *Matter of Fulnau Corp.* (S.D. N.Y. 1943), 49 F. Supp. 570.

The National Labor Relations Board frequently undertakes to carry out its duties under the LMRA, notwithstanding the advent of bankruptcy proceedings. *NLRB v. Coal Creek Coal Co.,* supra; *NLRB v. Baldwin Locomotive Works,* supra; *In re American Buslines,* supra. Moreover, its proceedings in such instances take precedence over the bankruptcy proceedings. In *Nathanson, Trustee v. National Labor Relations Board,* 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23, the Supreme Court held that particular controversies "should be remitted to another tribunal for litigation" (344 U.S. at 30); and, further, that "wise administration . . . demands that the bankruptcy court accommodate itself to the administrative process." (Id. at 30.)

Arbitration is, likewise, an "administrative process" to which bankruptcy proceedings should also defer under federal labor law. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers v. Enterprise Corp.,* 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424; *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320. It must be concluded that suits to compel arbitration, such as in the instant case, are to be accorded a primary status over bankruptcy proceedings similar

to that accorded to the NLRB, if federal labor policy is to be fully effectuated.[5]

The Courts have recognized that, to fully effectuate the congressional intent manifested by the enactment of the Labor Management Relations Act, certain employee rights transcend the boundaries of corporate existence. Thus, matters for bargaining, to be included in the terms of collective bargaining agreements, and often made mandatory bargaining subjects by the labor law, include those which by their very nature become operative at a time subsequent to the work which earned them. In *Goodall-Sanford Inc. v. United Textile Workers* (C.A. 1, 1956), 233 F. 2d 104, Chief Judge Magruder held that where a collective bargaining agreement gave employees various benefits, such as group life, medical and hospitalization insurance, pensions, and vacation pay, the question of whether the employer had the right to terminate all operations at certain mills and to terminate

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[5]In *In re Muskegon Motors Specialties Co.* (C.A. 6, 1963), 313 F. 2d 841, the Court of Appeals held that it was not an abuse of discretion for the District Court to refuse to surrender its jurisdiction in favor of arbitration under the terms of a collective bargaining agreement. A reading of the case indicates that the motivation for the decision was primarily because "labor peace was not an issue" and that the employer "was out of business and had no plant or employees" (supra, at 843). Also, the Court relied upon State Court decisions in Michigan holding that employees had no claim for vacations against an employer who had gone out of business prior to the vacation rights becoming fixed, thus passing on the merits of the arbitration claim, contrary to the principles enunciated by the Supreme Court in *United Steelworkers v. Warrior and Gulf Nav. Co.*, supra. The *Muskegon* case is clearly erroneous in its view of the importance of arbitration of controversies which survive the cessation of the employer's operations. See the subsequent Supreme Court decision in *Republic Steel v. Maddox*, ... U.S. ....., 85 S. Ct. 614, 13 L. Ed. 2d 580.

the employment of employees at those mills was an arbitrable question under the agreement. Judge Magruder stated:

> ". . . in view of the increasingly complex use of compensation in the form of 'fringe benefits', some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that *there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern.*" (223 F. 2d at 110; emphasis supplied.)

This assertion of the national labor policy is particularly apt to the instant case where employees' pension rights are directly involved in the issues sought to be arbitrated. See also *Republic Steel Corp. v. Maddox,* ..... U.S. ....., 85 S. Ct. 614, 13 L. Ed. 2d 580 (decided January 25, 1965); *John Wiley & Sons v. Livingston,* 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898; *Wackenhut Corp. v. Guard Workers Local 151* (C.A. 9, 1964), 332 F. 2d 954; *United Furniture Workers v. McCoy-Couch Furniture Mfg. Co.* (E.D. Ark. 1963), 223 F. Supp. 880.

It must be concluded that these important employee rights, including the right of arbitration under a collective bargaining contract, which have been recognized by the Courts as surviving the termination of an employer's operations, may not be destroyed merely because an employer files a voluntary petition in bankruptcy. The national labor policy favoring arbitration as the preferred method of resolving dis-

putes arising under collective bargaining contracts has been manifested by Congress, and this intent of Congress has been respected and enforced by the Courts.

B. Where a Federal Court has jurisdiction under § 301, LMRA, or where a State Court has jurisdiction by virtue of an action brought under State laws, such a Court should order arbitration pursuant to the terms of a collective bargaining agreement even though the employer has ceased operations and has filed a petition in bankruptcy.

It is now beyond argument that the national labor policy requires that disputes between parties to a collective bargaining agreement are to be resolved pursuant to arbitration where the parties have so agreed. *National Labor Relations Act,* § 1 (29 U.S.C. § 151); *Labor Management Relations Act,* §§ 201, 203 (d), 301 (29 U.S.C. §§ 171, 173(d), 185); *Textile Workers Union v. Lincoln Mills,* supra; *United Steelworkers v. Warrior and Gulf Nav. Co.,* supra; *United Steelworkers v. Enterprise Corp.,* supra; *United Steelworkers v. American Mfg. Co.,* supra; *John Wiley & Sons v. Livingston,* supra; *Carey v. Westinghouse Electric Corp.,* supra; *Republic Steel Corp. v. Maddox,* supra; *Grunwald-Marx Inc. v. Los Angeles Joint Board,* 52 Cal. 2d 568, 343 P. 2d 23; *O'Malley v. Wilshire Oil Co.,* 59 Cal. 2d 482, 381 P. 2d 188.

The national labor policy favoring the enforcement of agreements to arbitrate has been uniformly applied by the Courts and the NLRB so as to give precedence to the arbitration process. *Carey v. Westinghouse Electric Corp.,* supra; *Smith v. Evening News Assn.,* 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246; *Drake*

Bakeries v. Local 50, 370 U.S. 254, 82 S. Ct. 1346, 8 L. Ed. 2d 474; *Republic Steel Corp. v. Maddox,* supra; *Raley's Inc. d/b/a Raley's Super Markets,* 143 NLRB No. 40; *Retail Clerks Local 770 v. Thriftimart,* 59 Cal. 2d 421, 380 P. 2d 652; *Spielberg Mfg. Co.,* 112 NLRB 1080.

It is thus clear that arbitration is to be accorded a preferred status under the national labor policy; that status should likewise control proceedings in bankruptcy, insofar as suits in state or federal courts to compel arbitration pursuant to the terms of collective bargaining agreements are concerned.

It is well settled that Congress has the power to vest in other forums jurisdiction over certain proceedings which may arise in the course of the bankruptcy proceedings, and the power to require that the bankruptcy Court *qua* bankruptcy Court surrender its jurisdiction to these other Courts. *Callaway v. Benton,* 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553; *Order of Railway Conductors of America v. Pitney,* 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 60 S. Ct. 628, 84 L. Ed. 876; *Foust, Admr. of Munson S.S. Lines,* 299 U.S. 77, 57 S. Ct. 90, 81 L. Ed. 49; *Tucker v. Texas American Syndicate* (C.A. 5, 1948), 170 F. 2d 939; *In re Spier Aircraft Corp.* (C.A. 3, 1943), 137 F. 2d 736; *Nathanson, Trustee v. NLRB,* supra; *Milens v. Bostian* (C.A. 8, 1943), 139 F. 2d 282; *Matter of Florida East Coast Ry. Co.* (S.D. Fla. 1943), 49 F. Supp. 527; *Layton v. Thayne* (C.A. 10, 1944), 144 F. 2d 94.

The decisions under the Bankruptcy Act itself lend emphatic support to the contention that the trustees in bankruptcy and the bankrupt corporation may be compelled to submit to arbitration pursuant to the terms of a collective bargaining agreement. In *Tobin v. Plein* (C.A. 2d, 1962), 301 F. 2d 378, the Court of Appeals held that a trustee in bankruptcy's discretion to submit claims to arbitration, founded on § 26 of the Bankruptcy Act (11 U.S.C. 49),[6] does not supersede explicit contractual provisions for arbitration inasmuch as § 26 is clearly drawn to provide arbitration *"where no contractual arrangements exist"*. (Supra, at 381; emphasis supplied.) See also *Schilling v. Canadian Foreign S.S. Co.* (D.C. N.Y. 1961), 190 F. Supp. 462, wherein it was held that § 26 does not give the bankruptcy trustees a right to abrogate agreements for arbitration.[7]

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[6]Section 26 (11 U.S.C. 49) reads:

"(a) The receiver or trustee may, pursuant to the direction of the Court, submit to arbitration any controversy arising in the settlement of the estate.

"(b) Three arbitrators shall be chosen by mutual consent, or one by the receiver or trustee, one by the other party to the controversy, and the third by the two so chosen, or, if they fail to agree in five days after their appointment, the Court shall appoint the third arbitrator.

"(c) The written finding of the arbitrators or of a majority of them as to the issues presented may be filed in court and shall have like force and effect as the verdict of a jury."

[7]In 3 *Collier on Bankruptcy*, § 57.15 (3.3) it is stated:

"That arbitration is in no way opposed to the spirit of the [Bankruptcy] Act is best illustrated by the express recognition in § 57(d) of 'reasonable estimation' as a means of liquidation. Estimation goes, if anything, a step further than arbitration." (At page 243.)

Although the *Schilling* decision, in dictum, implies that the rule would be otherwise where the party seeking arbitration is a creditor of the bankrupt, such dictum must of necessity be confined, if

It is therefore clear that the LMRA and the Congressional intent in its enactment, as manifested by the decisions of the NLRB and the Courts in fashioning a national labor policy, give to the state and federal courts jurisdiction which supersedes the jurisdiction of the bankruptcy Court *qua* bankruptcy Court in suits to compel arbitration under a collective bargaining agreement. This conclusion is reinforced, as noted above, by the decisions under the Bankruptcy Act itself holding that a bankruptcy trustee can be compelled to submit to arbitration under explicit contractual terms.

It is submitted that the District Court below misunderstood its function in relation to the parties and the issues before it. The integrity of the right of arbitration under a contract as expressed in the national labor policy as well as in the Bankruptcy Act itself should have been upheld as against the submergence of those rights in the pending bankruptcy proceedings—a result necessarily flowing from the lower Courts' refusal to require the parties to respect their contract to arbitrate.

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relevant at all, to the usual creditor-debtor situation. In the instant case, the appellants are not creditors in the usual sense and they have behind them a strong and clear federal policy assuring to them their rights as employees and as a labor organization to arbitration of controversies arising pursuant to the terms of a collective bargaining agreement.

C. Inasmuch as applicable Federal law requires the surrender of jurisdiction by the Bankruptcy Court qua Bankruptcy Court to the appropriate State or Federal forum questions concerning arbitration under the terms of a collective bargaining agreement, such other forum may exercise its traditional powers in equity to preserve the status quo or to render effective any decision or award resulting therefrom.

That the state Court had power to issue its injunctions in the instant matter and to take other action pending an abitration proceeding is now firmly established law. *Textile Workers Union v. Lincoln Mills,* supra; *Local Division 1098 etc. v. Eastern Greyhound Lines* (D.C. for D. of C., 1963), 225 F. Supp. 28.[8] The Courts of the State of California have similar powers, traditionally and by statute. *Code of Civil Procedure,* §§ 525-533; *Biasca v. Superior Court,* 194 Cal. 366; *McDonald v. Superior Court,* 18 Cal. App. 2d 652; *Rohrer v. Babcock,* 114 Cal. 124; *Mulvey v. Wangenheim,* 23 Cal. App. 268; *Pasadena v. Superior Court,* 157 Cal. 781.

There was an additional and fundamental reason for the issuance of an injunction in the instant case which clearly justifies the exercise of the equity power of the Court. Appellants seek to have the question of whether or not a valid, specific and enforcible pension trust for the benefit of the employees was, in fact,

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[8]In the *Greyhound* case, supra, Judge Holtzoff, in granting an injunction restraining the employer from moving its repair and maintenance operations from Washington, D.C. to Chicago, Illinois, pending an arbitration between the parties as to whether the employer had such right, declared:

> "If the Court has power to order specific performance of such a covenant, it has collateral power to take steps that would prevent rendering the result of the arbitration futile and ineffective." (Supra, at page 31.)

established pursuant to the terms of the collective bargaining agreement. It is well settled that assets held by the bankrupt in trust are not part of the bankrupt's estate to be administered and distributed by the bankruptcy Court and the trustee in bankruptcy for the benefit of creditors. See *United States Nat. Bank in Johnstown, Pa. v. Blauner's Affiliated Stores* (C.A. 3, 1935), 75 F. 2d 826; *Stickney v. General Electric* (C.A. 4, 1930), 44 F. 2d 362; *Cooper v. Buckley, et al.,* 84 Pa. Super. 83; *Simmermaker v. Intl. Harvester,* 230 Ia. 895, 298 N.W. 911; *Hart v. Roman,* 58 N.D. 516, 226 N.W. 620.

In *Adams v. Champion,* 294 U.S. 232, 79 L. Ed. 880, a trustee in bankruptcy asserted a claim against the receiver of a national bank for the value of property received by the bank as an unlawful preference. The receiver admitted the validity of the claim, if it was placed upon the same level as the claims of creditors at large, but insisted that the claim had priority on the ground that the "avails of the unlawful preference are subject to a trust". (Supra, at 232.) In finding that the receiver of the bank was merely a bailee and that there was no trust relationship in existence, Mr. Justice Cardozo, speaking for the Court, said:

> "We do not need to consider whether effect would be given to such an agreement according to its form if the bank at that time had been under a present duty to set up a trust as to the proceeds to the use of the bankrupt or of the trustee as his successor. For the purposes of this case we assume, though we do not hold, that *a*

trust in that event would attach to the cash assets in the vaults to an equivalent amount." (Supra, at page 237; emphasis supplied.)

Appellants submit that the facts which are the basis of Justice Cardozo's assumption are precisely those in the case at bar. There is a specific pension trust agreement in existence and the bankrupt corporation failed to make the required payments thereto. It must therefore be concluded that a constructive trust attaches to the bankrupt's funds to the extent of the bankrupt corporation's liability under the trust agreement.[9]

Whether or not a constructive trust, on this theory, can be impressed upon the assets of the corporation is a question that need not now be decided by this Court. The existence of such a trust, as contended by appellants, is, however, a vital reason for the allowance of the injunction in the state Court. In any event, it is for that Court, in the exercise of its equity discretion, to determine whether or not an injunction should issue to protect its order directing that arbitration proceed. It is for the arbitrator to decide whether the collective bargaining agreement

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[9]The Supreme Court decision in *McKey v. Paradise,* 299 U.S. 119, 81 L. Ed. 75, cited by appellees in the court below, is easily distinguishable. In the *McKey* case, by agreement, the employer was to pay part of each employee's wages to a certain welfare association. The Court found that what was otherwise a debt to the employees was to become a debt to the association. It also found that, on the facts, the agreement did not give to the employee or the association equitable title to or lien upon any part of the employer's property. The case at bar is significantly different. Here there was a specific and enforcible trust, as such, created.

by its terms required the employer to establish such a trust fund, and if so, whether the employer violated the agreement in this respect. Should the arbitrator so find, such an award plainly would be barren of any benefit to the injured employees if the Court's injunction were not to remain effective.

II.

A SUIT TO COMPEL ARBITRATION PURSUANT TO THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT BETWEEN AN EMPLOYER AND A LABOR UNION, BROUGHT IN A STATE COURT UNDER STATE LAW, IS NOT ONE FOUNDED ON A CLAIM OR RIGHT ARISING UNDER THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES, SO AS TO MAKE IT REMOVABLE WITHIN THE MEANING OF § 1441(b) OF THE REMOVAL STATUTE.

A. The Labor Management Relations Act does not affect the right of a party to a collective bargaining agreement to bring an action in a State Court for violation of that agreement.

In *Dowd Box v. Courtney,* supra, the United States Supreme Court was presented with the question of whether Section 301(a) of the LMRA, supra, divests a state Court of jurisdiction over a suit for violation of a contract between an employer and a labor organization. The question arose by reason of the fact that a Massachusetts trial Court had rejected an attack upon its jurisdiction in an action by a union against an employer seeking money damages for violation of a collective bargaining agreement, and had subsequently rendered a money judgment in favor of the union. The Supreme Judicial Court of Massachusetts

affirmed,[10] ruling that § 301 had not granted the federal Courts exclusive jurisdiction over suits for violation of labor contracts in industries affecting interstate commerce.

In affirming the Massachusetts Court's ruling, the U. S. Supreme Court said:

> "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. . . . The legislative history makes clear that the *basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations.*" (368 U.S. 502, 507-509, 82 S. Ct. 519, 522-523; emphasis supplied.)
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> * * *
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> "The clear implication of the entire record of the Congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts *was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the vairous states over contracts made by labor organizations.*" (Id. at page 511, 82 S. Ct. page 525; emphasis supplied.)

In the case of *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593, the Supreme Court applied its decision in *Dowd Box,* supra,

[10]341 Mass. 337, 169 N.E. 2d 885.

to the issue raised as to whether a state Court had jurisdiction over a suit for violation of a collective bargaining agreement. In expressly recognizing the right of a party to a collective bargaining agreement to bring a suit for violation thereof in a state court under the common law or statutory jurisdiction of that Court, the Supreme Court held that substantive principles of federal labor law must be applied in suits of a kind covered by § 301 of the LMRA. Thus, while the traditional jurisdiction of the state Courts inheres in suits for violation of collective bargaining agreements, incompatible doctrines of local law must give way to principles of federal labor law. This rationale was based, not on some notion of a greater or higher *jurisdiction* in the federal Courts, but because the subject matter "is peculiarly one that calls for uniform law." 369 U.S. 95, 103.

Other Courts, both state and federal, have held that state Courts have not been deprived of their traditional jurisdiction in suits for violation of collective bargaining agreements by the enactment of § 301 and by the availability of the federal district Courts as an additional forum for the resolution of disputes involving collective bargaining agreements. For *pre-Dowd Box* decisions, see, for example, *Philadelphia Marine Trade Assn. v. International Longshoremen's Assn., Local 1291* (1955), 115 A. 2d 733, 382 Pa. 326, cert. den. 350 U.S. 843, 76 S. Ct. 84, 100 L. Ed. 751; *Ryan Aeronautical Co. v. Intl. Union, United Auto., Aircraft and Agr. Implement Workers, Local 506* (D.C. Cal. 1959), 179 F. Supp. 1; *Minkoff v. Scran-*

ton Frocks Inc. (D.C. N.Y. 1959), 172 F. Supp. 870; *McCarroll v. Los Angeles County District Council of Carpenters* (1957), 315 P. 2d 322, 49 C. 2d 45, cert. den. 355 U.S. 932, 78 S. Ct. 413, 2 L. Ed. 2d 415; *Foley Construction Co. v. Truck Drivers,* Ohio Com. Pl. 1960, 172 N.E. 2d 170. For *post-Dowd Box* decisions upholding the traditional exercise of jurisdiction by the state Courts, see, for example, *Humphrey v. Moore* (1964), 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370, rehearing denied 376 U.S. 935, 84 S. Ct. 697, 11 L. Ed. 2d 655; *Milk Drivers and Dairy Emp. Union Local 338 v. Dairymen's League Co-op.* (C.A. N.Y. 1962), 304 F. 2d 913; *St. Louis Mailer's Union, Local 3 v. Globe Democrat Pub. Co.* (D.C. Mo. 1964), 233 F. Supp. 529; *Independent Oil Workers v. Socony Mobil Oil Co.* (1964), 205 A. 2d 78, 85 N.J. Super. 453; *Morceau v. Gould-National Batteries, Inc.* (1962), 181 N.E. 2d 664, 344 Mass. 120; *Gage Plumbing Supply Co. v. Local 300* (1962), 20 Cal. Rptr. 860, 202 C.A. 2d 197, 92 A.L.R. 2d 1223; *Operating Engineers, Local Union 3 v. Pittsburgh-Des Moines Steel Co.,* (D.C. Cal. 1965), ... F. Supp. ....., (Civil No. 43,118, dated February 9, 1965).

Appellants commenced this suit in the Superior Court in and for the City and County of San Francisco and relied on the provisions of state statutory law for the commencement of the suit, to wit, Sections 1280 et seq. of the Code of Civil Procedure of the State of California. The Supreme Court and the decisions of the lower courts in accord have made it overwhelmingly clear that they have a right to do so.

B. A Federal District Court does not have original jurisdiction of a suit for violation of a collective bargaining agreement brought in a State Court under State law and a motion to remand the proceedings to the State Court, after the filing of a petition for removal to the District Court, should be granted.

The District Court's denial of appellants' motion to remand the proceedings to the state Court, after a petition for removal to the federal Court had been filed by appellees, rendered ineffectual the Congressional policy intended to have § 301(a) "supplement" and "not to displace" or "to encroach upon the existing jurisdiction of the state courts" in suits for violation of collective bargaining agreements in industries affecting commerce.[11] Further, the District Court's denial of remand had the inevitable consequence of ousting the state Court of its jurisdiction in a field not preempted by Congress, in contravention of the historic comity doctrine which proscribes avoidable direct conflicts between federal and state Courts.

For the petition for removal in the instant case to have been properly granted the action must come within the terms of the Removal Statute, 62 Stat. 937; 28 U.S.C. § 1441.[12]

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[11] *Dowd Box v. Courtney*, supra, at pages 488, 489.

[12] Section 1441 reads:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under

The District Court in the instant case evidently and erroneously premised its denial of remand on the ground that it had *original jurisdiction* under § 301(a) of the Labor Management Relations Act, of a suit for violation of a labor contract, and that § 1441(b) of the Removal Statute therefore permits the removal to a federal District Court of a civil action of which it has jurisdiction under a law of the United States.

While it is clear that federal substantive law applies in suits for violation of collective bargaining agreements (*Textile Workers Union v. Lincoln Mills,* supra), the transcending question involved here is whether the action commenced in the state Court was "founded on a claim or right arising under the Constitution, treaties or laws of the United States", so as to make it removable, within the meaning of § 1441(b) of the Removal Statute. Reversal of the denial of remand will be required if the removed state action was *not* "founded on a claim of right arising

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the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." June 25, 1948, c. 646, 62 Stat. 937, 28 U.S.C. § 1441.

under" § 301(a) of the Labor Management Relations Act.[13]

The Supreme Court in 1821 was first called upon to decide when a case "arises under a law of the United States." In the landmark case of *Cohens v. Virginia,* 6 Wheat. 264, 5 L. Ed. 257, Mr. Chief Justice Marshall, speaking for the Court said:

> "A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, *whenever its correct decision depends on the construction of either."* (6 Wheat. 264 at 369; emphasis supplied.)

In so holding the Supreme Court rejected the contention that a case *arises* under the Constitution or a law of the United States *merely* because it is founded on a right conferred by the Constitution or a federal law.

The Supreme Court amplified this rule three years later in *Osborn v. Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204 (1824). Chief Justice Marshall, again speaking for the Court, stated that a case arises under the constitution or laws of the United States when *"the title or right set up by the party may be defeated by one construction of the constitution or law of the United States and sustained by the opposite*

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[13]In *American Dredging Co. v. Local 25, Marine Div., Int. Union of Op. Engineers* (C.A. 3, 1964), 338 F. 2d 837, it was stated:

> "In a removal proceeding under § 1441 that statute must be harnessed in a real sense to the specific federal law (here § 301(a)) relied upon as conferring original jurisdiction upon the District Court." (Page 848.)

construction." (9 Wheat. at 822; emphasis supplied.) See also *Little York Goldwashing & Water Co., Ltd. v. Keyes,* 96 U.S. 199, 24 L. Ed. 656 (1878); *Storin v. New York City,* 115 U.S. 248, 6 S. Ct. 28, 29 L. Ed. 388 (1885).

Shultis v. McDougal, 225 U.S. 561, 32 S. Ct. 704, 56 L. Ed. 1205, decided in 1912, is another case wherein the Supreme Court, following its declaration that jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth in the complaint, stated:

> "A suit to enforce a right which *takes its origin* in the laws of the United States is not necessarily, or for that reason alone, one *arising* under those laws, for a suit does not so arise *unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.*" (225 U.S. at 569, 32 S. Ct. at 706; emphasis supplied.)

In *Gully v. First National Bank in Meridian,* 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936), where the doctrine of *Shultis,* supra, and its predecessors, was cited with approval by the Supreme Court in reversing for failure to remand a removed case to the state Court, it was declared:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. *To bring a case within the* [*removal*] *statute, a right or immunity created by the Constitution or laws of the United States*

must be an element, and an essential one of the plaintiff's cause of action. [Citing *Starin,* supra, and *First National Bank of Canton, Pa. v. Williams,* 252 U.S. 504, 512, 40 S. Ct. 372, 64 L. Ed. 690 (1920).] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another [citing cases]. *A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto* [citing cases], *and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.* [Citing cases]." (Id. at 113; emphasis supplied.)

It must be assumed that Congress, when it revised the Removal Statute in 1948, was fully aware of the Supreme Court's long and consistent construction of the phrase "arising under the Constitution or laws of the United States."[14]

The decision of the Supreme Court in 1961 in *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656, 662-663, 81 S. Ct. 1303, 6 L. Ed. 2d 584, is of compelling significance in the instant case. There, in re-affirming the doctrines elaborated

[14]It was stated in *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 10, 71 S. Ct. 534, 95 L. Ed. 702 (1951), that one of the main purposes of the 1948 revision of the Removal Statute was to further limit removal of cases from the state courts. Prior to 1948, the Court, in holding that removal statutes must be strictly construed by the courts, noted: ". . . the Congressional purpose to restrict the jurisdiction of the federal courts on removal." See *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941).

upon in *Gully v. First National Bank in Meridian,* supra, and its predecessors, these settled jurisdictional principles were stated and applied:

1. ". . . [Q]uestions of exclusive federal jurisdiction *and ouster of jurisdiction of state courts are,* under existing jurisdictional legislation, *not determined by ultimate substantive issues of federal law.*" (Id. at p. 589; emphasis supplied.)

2. "The answers depend on *the particular claims a suitor makes in a state court—on how he casts his action.* Since *'the party who brings a suit is master to decide what law he will rely upon.' The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716". (Id. at 589; emphasis supplied.)

3. It is "immaterial . . . that the plaintiff could have elected to proceed on a federal ground", and *"if the plaintiff decides not to invoke a federal right, his claim belongs in a state court."* (Id. at 589; emphasis supplied.)

4. *"It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint* that determination of the suit depends upon a question of federal law . . ." (Id. at 589; emphasis supplied.)

5. "Apart from diversity jurisdiction, *'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal . . .'* " (Citing *Gully v. First National Bank,* supra.) (Id. at 589; emphasis supplied.)

Applying the principles stated above to the instant case it must be concluded that it was not a case "arising under" § 301(a) of LMRA or any other law of the United States, so as to permit removal under § 1441, since the petition and complaint in the state Court was cast solely on a state created right to bring suit for violation of a collective bargaining agreement and sought only a remedy under state law. There is nothing in the petition and complaint which even remotely suggests that appellants were asserting a claim based on § 301(a), or that it presented a dispute or controversy respecting the validity, construction, or effect of § 301(a) "upon the determination of which the result [of the suit] depends." *Shultis v. McDougal,* supra, at page 706.

The denial of remand by the District Court denied to appellants their right, under settled law, to cast their action on state-created rights rather than on rights available under federal law, to wit, § 301(a). The lower Court's denial of remand deprived appellants of their right to proceed in a state Court by ignoring the specific holding in *Dowd Box,* supra, that Congress, in enacting § 301(a), did not make that statute's jurisdiction exclusive, nor did it intend "to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal." (Id. at 507, 82 S. Ct. at 522.)

Moreover, the denial of remand ousted the state Court of its jurisdiction not only in contravention of the historic comity doctrine which proscribes avoidable conflicts between federal and state Courts, but in

disregard of the specific holding in *Dowd Box,* supra, that Congress did not intend in § 301(a) "to deprive the state courts of a substantial segment of their established jurisdiction over contract actions."[15]

To hold that § 1441 may be utilized to defeat the clearly stated Congressional purpose in enacting § 301(a) would be to mock reason and deny justice where, as here, the complaint was based solely on state-created rights and did not raise any issue with respect to the validity, construction or effect of § 301(a).

It must be concluded that the action properly belongs in the state Court, and that the District Court below erred in denying appellants' motion for remand.

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[15]The quoted statement appears in the following sentence at 368 U.S. page 508, 82 S. Ct. at page 523:

> "To hold that § 301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction.

The comity principle was stated in *Covell v. Heyman,* 111 U.S. 176, 4 S. Ct. 355, 28 L. Ed. 390 (1884) as follows:

> "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. *It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience.*" (Supra, at 182, 4 S. Ct. at 358; emphasis supplied.)

See also *Shamrock Oil & Gas Corp. v. Sheets,* supra, at footnote 13 citing *Healey v. Ratta,* 292 U.S. 263, 270, 54 S. Ct. 700, 703, 78 L. Ed. 1248 to the effect that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." And see *American Dredging Co. v. Local 25, Marine Div., Int. U. of Op. Engineers* (C.A. 3, 1964), 338 F. 2d 837, at Note 20, page 847.

CONCLUSION

For the foregoing reasons it is respectfully submitted that his Court should reverse the orders of the District Court below and remand the cause to the District Court with directions to enter a judgment in favor of petitioners, Walter Johnson, individually and as Secretary-Treasurer of Department Store Employees Union, Local 1100, and its members, and William Silverstein, individually and as Secretary-Treasurer of Retail Shoe & Textile Salesmen's Union, Local 410, and its members, and against respondents Raphael Weill & Co., Inc., and respondents by intervention John M. England, C. E. Strobel, and Walter J. Hempy, as trustees in bankruptcy, declaring and finding that petitioners are entitled by law to compel said respondents to submit to arbitration pursuant to the terms of a collective bargaining agreement, notwithstanding the advent of bankruptcy proceedings. The District Court below should also be directed to enter an order remanding the proceedings herein to the Superior Court of the State of California, in and for the City and County of San Francisco, upon a finding that petitioners' suit is not a proper one for removal to the federal District Court.

Dated, San Francisco, California,
July 19, 1965.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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